87-803

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

JOSEPH HOUGHTON,
DONNA HOUGHTON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Assuming *arguendo* that this federal mail fraud indictment as supplemented by a prosecutor's bill of particulars was sufficient under Sixth Amendment notice standards, should not the indictment nonetheless have been dismissed on the separate and distinct grounds that it was insufficient under the Fifth Amendment which — as a necessary corollary of the right of grand jury accusation — requires that a federal indictment be sufficiently specific in its key charging provisions that petitioners have assurance that they stand trial on the grand jury's charge, not the prosecutor's accusation?

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Reasons for Granting the Writ:

There exists a substantial federal criminal procedural question — particularly in modern complex white collar offenses — and a current split of the Circuits as to whether the Fifth Amendment grand jury accusation clause is an ingredient in measuring the facial sufficiency of federal indictments, with only some Circuits — not the Third Circuit from which this case originates — requiring that the indictment be sufficiently specific to insure that the defendant stands trial on the same accusation made by the grand jury, not on a prosecutor's later developed theory set forth in a bill of particulars. 8

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No. _____

In The

Supreme Court of the United States

October Term, 1987

JOSEPH HOUGHTON,
DONNA HOUGHTON

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Joseph Houghton and Donna Houghton jointly* pray that a writ of certiorari issue to review the judgment of the

* This joint petition on behalf of both Joseph and Donna Houghton is authorized under Supreme Court Rule 19.4. Other parties charged in the same indictment, Frank Livoy, Nancy Cohan, Linda Livoy, Jack Cassidy and Kathleen Cassidy, have not petitioned for writ of certiorari. Supreme Court Rule 21.1(b).

United States Court of Appeals for the Third Circuit which affirmed the judgments of conviction entered against them following a jury verdict of guilty.

STATEMENT OF JURISDICTION

Petitioners Joseph and Donna Houghton jointly seek a writ of certiorari to review the judgment (Appendix C) rendered by the United States Court of Appeals for the Third Circuit on August 10, 1987. On September 18, 1987, the Court of Appeals for the Third Circuit denied rehearing (Appendix D). The judgment affirmed petitioners' criminal convictions in the United States District Court for the Eastern District of Pennsylvania following a jury trial and, as here pertinent, denial of petitioners' pre-trial motion to dismiss the indictment (Appendix B).

The United States Supreme Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1). Rehearing having been denied on September 18, 1987, this petition is timely filed on or before November 17, 1987. Supreme Court Rule 20.1.

RELEVANT CONSTITUTIONAL PROVISIONS

Amendment V, United State Constitution — Grand Jury Indictment for Infamous Crimes, Etc.:

> — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

> criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, United States Constitution — Jury Trial for Crimes and Procedural Rights:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Procedural History

Petitioners were indicted by a federal grand jury in the Eastern District of Pennsylvania and charged with violations of the federal mail fraud statute, 18 U.S.C. § 1341, and related offenses.

Following denial of petitioners' pretrial motion to dismiss the indictment (Appendix B) raising the same issue here presented, petitioners were tried before the late Chief Judge Alfred L. Luongo and a jury and were convicted on most counts. Joseph Houghton was sentenced to a term of imprisonment of eight years, Donna Houghton to a term of five years probation, and both were ordered to pay fines and restitution of over one million dollars.

On direct appeal to the United States Court of Appeals for the Third Circuit where, again, the present issue was raised for appellate review, petitioners' convictions were affirmed (Appendix C), rehearing *en banc* was thereafter denied (Appendix D), and the mandate stayed pending application for certiorari (Appendix E).

B. Concise Statement of Facts

Joseph and Donna Houghton, husband and wife, together with five other persons were charged with participation in a scheme to defraud insurance companies by making false claims over a ten year period in various personal injury and property damage matters. In Appendix A the opening nine pages of this 55 page superseding indictment are reprinted describing the alleged scheme to defraud (the remaining pages are omitted, as they charge specific mailings in furtherance of the scheme and shed no further light on the alleged nature of the scheme itself).

The indictment is prolix in the sense that numerous accusations are set forth in the charging portion of the indictment relating to various aspects of the charged scheme. But it will be noted on close reading of the charging language that the prolixity masks the absence of any specific allegation dealing with any specific claim in which the petitioners, or their co-defendants, participated. While the indictment is wordy, it is singularly uninformative on what turned out to have actually been charged.

As it developed through three bills of particulars later provided by the government, the prosecutors contended that the scheme to defraud charged in the indictment comprised over 25 separate incidents of varying character and nature. None of these incidents — or any other specific incident for that matter — is alleged in the indictment and, of course, no such incident is characterized in the indictment as to its alleged fraudulent nature.

Some of the incidents comprising the scheme were described in the subsequently furnished bills of particulars to have been "staged", in the sense that the prosecutors contended that the incidents had been deliberately set up by the co-conspirators in order to generate false insurance claims. In such an incident, the fraud existed *ab initio* because the event had been prearranged and was not an "accident" as was asserted during the ensuing claim process. But other of the incidents were not contended by the prosecutors to have been "staged", but rather were deemed to be fortuitous events which the prosecutors contended had been exploited by the co-conspirators by inflated medical bills and false claims regarding the extent of injuries or property damage. As it developed — through the bills of particulars, not the silent indictment — each of the 25 or so incidents had to be examined independently to determine the basis upon which it constituted fraud. Referring again to Appendix A, it is self-evident on the face of the indictment that the grand jury was not asked to perform this incident-by-incident analysis, yet the *particular* fraud in the *particular* incident was the keystone of the charges.

The charges in the present case were similar to the charges set forth in the indictment in *United States v. Miller,* 471 U.S. 130 (1985). In *Miller,* the mail fraud charge dealt with a single incident involving what was contended to have been a consent-staged burglary of a commercial location in which the insurance claimant inflated the ensuing loss. Two distinct theories of fraud were advanced: (1) that the burglary had been consent-staged; and, (2) that whatever loss had occurred had been inflated with incidental misrepresentations to the insurance company. In that case, the Court considered whether it constituted an amendment of the indictment if the government proceeded solely on the theory of inflated loss, and ignored the claim of staged burglary. The case is discussed, *infra*, but in short, the Court held that defendant had no complaint because he was convicted on a charge narrower — and not broader — than that returned by the grand jury.

The present indictment charged a similar type of mail fraud scheme. But what is dramatically different about the present indictment is that this indictment (without any facial indication of such) comprised over 25 separate incidents, each one of which is a mini-*Miller* case, *i.e.*, each incident varied in character from "staged" to "inflated" and, in some cases, to "fabrication" of some aspect of the claim.

As illustrated in the portion of the indictment set forth in Appendix A, it is impossible from a facial reading of the indictment to determine either of the following propositions: (1) the specific incidents charged by the grand jury; or (2) the nature and character of the fraud residing in the specific incidents. Because of the absence of specific allegations in the indictment, it is possible to read the indictment as alleging that in incident "A" the fraud resided in "staging"; whereas, with respect to incident "B" the fraud resided in inflation of medical expenses. By the same token, the opposite could be true, *i.e.*, incident "B" was found by the grand jury to have been "staged", while incident "A" was not staged but involved inflated injuries. This illustration must be multiplied by a factor of twelve to correctly set forth the possible combinations and permutations of incident-fraud that were possible under this indictment.

Compounding the problem, the possible combinations grew more complex by the time the government filed its third bill of particulars. By this time, the government was advancing what were called "alternative theories" on the incidents which the government had originally contended — and continued to contend — were staged. These "alternative theories" embraced concepts such as fraud residing in particular statements made during the claim process (not relating to extent of loss or injury) and statements made on insurance applications that had preceded the accidents. These "alternative theories" were not dependent on staging of the underlying incident and were submitted to the petit

jury by the trial court as a basis for conviction on certain of the incidents even if the jury was unable to find that the incident was staged.

The effect of the "alternative theories" set forth in the bills of particulars and the trial court's jury instructions was to permit conviction by the petit jury on theories considerably different from the original "staging" concept — a difference which amounted to a substantial broadening of the theory of criminal liability.

In petitioners' view, it is a corollary of *Miller* that the Fifth Amendment — distinguished from the Sixth — requires that an indictment be sufficiently specific that the broadening-narrowing test of *Miller* can be applied; otherwise, *Miller* is easily avoided by prosecutors who submit such generalized bills of indictments to grand juries that it is impossible to determine the specific charges brought by the grand jury.

REASONS FOR GRANTING THE WRIT

THERE EXISTS A SUBSTANTIAL FEDERAL CRIMINAL PROCEDURAL QUESTION — PARTICULARLY IN MODERN COMPLEX WHITE COLLAR OFFENSES — AND A CURRENT SPLIT OF THE CIRCUITS AS TO WHETHER THE FIFTH AMENDMENT GRAND JURY ACCUSATION CLAUSE IS AN INGREDIENT IN MEASURING THE FACIAL SUFFICIENCY OF FEDERAL INDICTMENTS, WITH ONLY SOME CIRCUITS — NOT THE THIRD CIRCUIT FROM WHICH THIS CASE ORIGINATES — REQUIRING THAT THE INDICTMENT BE SUFFICIENTLY SPECIFIC TO INSURE THAT THE DEFENDANT STANDS TRIAL ON THE SAME ACCUSATION MADE BY THE GRAND JURY, NOT ON A PROSECUTOR'S LATER DEVELOPED THEORY SET FORTH IN A BILL OF PARTICULARS.

Petitioners submit the following reasons for granting the writ of certiorari in this case:

1. Petitioners submit that there exists a split of the Circuits with respect to the approach used in testing the facial sufficiency of indictments where a claim, such as the present, is advanced that the indictment is inadequate on its face. As petitioners perceive it, there is a critical distinction between the notice requirement for sufficiency, based on the Sixth Amendment to the United States Constitution, and the constitutional right to grand jury accusation, which is based on the Fifth Amendment. This point was made in *Russell v. United States,* 369 U.S. 749, 770 (1962):

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic

> protection which the [Fifth Amendment] guaranty of the intervention of the grand jury was designed to secure. For the defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

Throughout the District Court and Circuit Court proceedings in this action, the government has persuaded the lower courts that the petitioners had received sufficient "notice" of the charges by virtue of the amplification of the charges contained in the various bills of particulars. Under this theory, the defendants knew in advance of trial which incidents were included within the alleged scheme and likewise knew the government's view of the characterization of those incidents, *i.e.*, the manner in which they were said to be fraudulent whether by reason of staging, inflation of claims, other statements during the claims process or the "alternative theories." But the issue is not notice. Petitioners' Fifth Amendment point has never been adequately answered.

The Third Circuit test for facial sufficiency of indictments is found in *United States v. Addonizio,* 451 F.2d 49, 58 (3d Cir.), *cert. denied,* 405 U.S. 936 (1972). That test, based on a narrow reading of *Hagner v. United States,* 285 U.S. 427, 431 (1932) does not consider the Fifth Amendment point and views the proper test as focusing on notice and avoidance of surprise, as well as protection against future jeopardy. *Addonizio* quotes this language from *Hagner:*

> The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other

> proceedings are taken against him for similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Hagner, supra* at 431.

No recognition is given in the Third Circuit to the Fifth Amendment guarantee that the charges be sufficiently specific to insure that the defendant stands trial on the accusation of the grand jury, not the prosecutor.

The Fifth Amendment ingredient in sufficiency of indictments is recognized by the Tenth Circuit, however. In *United States v. Radetsky,* 535 F.2d 556, 562 (10th Cir.) *cert. denied,* 429 U.S. 820 (1976). It was observed:

> [Discussing *Hagner*-type tests for sufficiency of indictments] . . . Furthermore, and of paramount importance, a sufficient indictment is required to implement the Fifth Amendment guaranty and make clear the charges so as to limit defendants jeopardy to offenses charged by a group of his fellow citizens, and to avoid his conviction on facts not found, or perhaps not even presented to, the grand jury that indicted him.

Cited in support of the above are *Wood v. Georgia,* 370 U.S. 375 (1964); *Russell v. United States,* 369 U.S. 749 (1962); *Stirone v. United States,* 361 U.S. 212 (1960) and *Gaither v. United States,* 413 F.2d 1061, 1066-67 (D.C. Cir. 1969).

Radetsky points out that bills of particulars may assist in helping an indictment pass muster in a Sixth Amendment notice sense, *id.* at 562, but are of no aid in answering a Fifth Amendment challenge:

> The argument based on the Fifth Amendment guaranty of trial only on an indictment of a grand jury raises serious questions. They must be carefully considered by focusing on the indictment in the context of the factual circumstances surrounding the requests for payment and the allegedly false statements and representations relied on by the Government, keeping in mind the important function of the constitutional guaranty and its historic protections.

Id. at 563.

The approach of the Circuits to this point is quite different and petitioner's case — coming from the Third Circuit — was judged under the less favorable view which is virtually confined to the Sixth Amendement test.

2. Petitioners ask — rhetorically, but with justification — how is the "narrowing-broadening" test of *United States v. Miller, supra*, to be applied to an indictment such as the indictment in the present case (Appendix A)?

In *Miller*, the difference between a consent-staged burglary and inflation of an ensuing claim was critical both to the prosecution theory of the case and the defense theory. It is self-evident that these are two distinct concepts which — if the Fifth Amendment guarantee of grand jury accusation is to have substantial meaning — is one which the grand jury should determine, not the prosecutor through later bills of particulars.

Indeed, this is really the premise of the Court's decision in *Miller*. In *Miller*, the Court continued to stand by *Stirone v. United States*, 381 U.S. 212 (1960). In *Stirone*, the indictment was amended by a broadening of the possible basis for conviction

from that which appeared in the indictment. The vice condemned in the *Stirone* case was that the defendant had been convicted of an offense not charged in the indictment. 361 U.S. at 213. In *Miller*, the Court cited the key language from *Stirone*:

> The right to have the grand jury make the charge in its own judgment is a substantial right which cannot be taken away with or without court amendment. Here . . . we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a non-existent steel mill had been interfered with. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted petitioner. *If so, he was convicted on a charge the grand jury never made against him. This was fatal error.*

(Emphasis added). 471 U.S. at 139. The *Miller* case continues to use the standard that a federal criminal defendant has a "substantial right to be tried only on charges presented in an indictment returned by a grand jury", *quoting* from *Stirone*. 471 U.S. at 140.

In the present case where twenty-five separate incidents arose from the midst of this indictment and where no incident is either referred to in the indictment or characterized as to alleged fraud, it seems self-evident that there is no certain way of telling whether the grand jury ever made the charge on which petitioners were convicted. *Stirone* says this is "fatal error".

CONCLUSION

For the foregoing reasons, petitioners pray that the writ of certiorari be granted.

Respectfully submitted,

JOHN ROGERS CARROLL
THOMAS COLAS CARROLL
CARROLL & CARROLL
Attorneys for Petitioners

APPENDIX A—SUPERSEDING INDICTMENT IN *UNITED STATES V. JOSEPH AND DONNA HOUGHTON, ET AL.*, CRIM. NO. 85-349, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (REDACTED)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

JOSEPH HOUGHTON, a/k/a "Thomas Cassidy"
DONNA HOUGHTON, a/k/a "Donna Livoy"
FRANK LIVOY, a/k/a "Norman Bradley"
LYNDA LIVOY
NANCY COHAN
JOHN CASSIDY, a/k/a "John Gavin"
KATHLEEN CASSIDY, a/k/a "Kathleen Gavin"

CRIMINAL NO. 85-00349
DATE FILED: _____
VIOLATIONS: 18 U.S.C. §§ 1341 & 2
(Mail Fraud - 43 Counts)
18 U.S.C. § 2314
(Interstate transportation of a security taken by fraud - 2 Counts)
18 U.S.C. § 1512(b)
(Tampering with a witness - 1 Count)

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES THAT:

Appendix A

1. At times relevant to this indictment,

JOSEPH HOUGHTON, a/k/a "Thomas Cassidy",

was married to DONNA HOUGHTON. They lived together at 3020 Eisenhower Drive, Norristown, Pennsylvania and, later at 12 Melissa Way, Plymouth Meeting, Pennsylvania.

2. At times relevant to this indictment,

DONNA HOUGHTON, a/k/a "Donna Livoy",

was the wife of JOSEPH HOUGHTON. DONNA HOUGHTON is the daughter of FRANK LIVOY and the sister of LYNDA LIVOY.

3. At times relevant to this indictment,

FRANK LIVOY, a/k/a "Norman Bradley",

lived at 912 Walnut Street, Collingdale, Pennsylvania. FRANK LIVOY IS THE FATHER OF DONNA HOUGHTON and LYNDA LIVOY. He is also the father-in-law of JOSEPH HOUGHTON.

4. At times relevant to this indictment,

LYNDA LIVOY

lived at 912 Walnut Street, Collingdale, Pennsylvania. LYNDA LIVOY is the sister of DONNA HOUGHTON and the daughter of FRANK LIVOY. She is also the sister-in-law of JOSEPH HOUGHTON.

Appendix A

5. At times relevant to this indictment,

NANCY COHAN

was an associate and employee of JOSEPH and DONNA HOUGHTON.

6. At times relevant to this indictment,
JOHN CASSIDY, a/k/a "John Gavin",

was married to KATHLEEN CASSIDY. They lived together at 3352 Bryan Court, Bensalem, Pennsylvania. JOHN CASSIDY is a lifelong friend of JOSEPH HOUGHTON.

7. At times relevant to this indictment,

KATHLEEN CASSIDY, a/k/a "Kathleen Gavin",

was the wife of JOHN CASSIDY. KATHLEEN CASSIDY is a friend of JOSEPH HOUGHTON.

8. From in or about 1975 until the present, in the Eastern District of Pennsylvania and elsewhere, the defendants

JOSEPH HOUGHTON, a/k/a "Thomas Cassidy"
DONNA HOUGHTON, a/k/a "Donna Livoy"
FRANK LIVOY, a/k/a "Norman Bradley"
LYNDA LIVOY
NANCY COHAN
JOHN CASSIDY, a/k/a "John Gavin"
KATHLEEN CASSIDY, a/k/a "Kathleen Gavin"

with other persons both known and unknown to this Grand Jury,

devised and intended to devise, by means of false and fraudulent pretenses, representations and promises, a scheme and artifice to defraud and to obtain money and property from various insurance companies.

9. It was the purpose and object of the scheme that the defendants attempted to and did unlawfully enrich themselves by illegally receiving at least $1,000,000 at the expense of their victims.

10. It was part of the scheme that the defendants obtained numerous insurance policies with overlapping coverage prior to the occurrence of alleged "accidents" and other types of losses and injuries. The purchase of numerous policies enabled the defendants to reap the maximum benefits from subsequent fraudulent insurance claims.

11. It was a further part of the scheme that the defendants staged and fabricated "accidents" and other types of losses and injuries.

12. It was a further part of the scheme that the defendants created and orchestrated the roles of the various participants in and witnesses to the "accidents". The seemingly disinterested participants and witnesses were, in reality, co-schemers and co-defendants who had been coached by the defendants concerning the fraudulent version of events which was to be communicated to insurance companies and to judges and juries.

13. It was a further part of the scheme that the defendants created and used aliases and fake identification. A primary means of establishing fake identification was carried out by obtaining credit cards in the names of fictitious individuals. The defendants would then use their new fictitious identities and become seemingly

disinterested participants in and witnesses to various "accidents". The use of aliases and fake identification enabled the defendants to file more fraudulent insurance claims without arousing suspicion on the part of insurance companies.

14. It was a further part of the scheme that the defendants lured police officers and medical emergency squads to the scene of bogus "accidents" and "losses", and away from their legitimate and vital duties. This was done in an attempt to lend credence to the fraudulent insurance claims which would be filed in the future.

15. It was a further part of the scheme that the defendants and their co-schemers lied to police officers and medical emergency personnel concerning the cause of the "accidents" and alleged injuries which resulted therefrom. These misrepresentations were designed to bolster fraudulent insurance claims which would be filed in the future.

16. It was a further part of the scheme that the defendants feigned and misrepresented pains and injuries allegedly resulting from "accidents", thereby permitting the defendants to stay at hospitals for extended periods of time and to amass medical bills. This was done in an attempt to create the impression that the alleged pains and injuries were of a serious nature. This aspect of the scheme also enabled the defendants to fraudulently obtain greater amounts of money from various insurance companies.

17. It was a further part of the scheme that the defendants submitted numerous false and fraudulent claims to insurance companies in order to unjustly enrich themselves.

18. It was a further part of the scheme that the defendants

made various material misrepresentations of fact in connection with the claims submitted, including, but not limited to:

a) the facts and circumstances surrounding the "accident" or "loss";

b) the number of policies and the types of insurance coverage which the defendants had;

c) the nature of the relationships which the defendants had with other participants in and witnesses to the "accident";

d) the nature and extent of injuries or losses incurred.

19. It was a further part of the scheme that the defendants omitted and withheld material information from insurance companies in connection with the claims submitted.

20. It was a further part of the scheme that the defendants submitted bogus receipts and bills to insurance companies in an attempt to bolster fraudulent claims.

21. It was a further part of the scheme that the defendants made various material misrepresentations of fact in statements to insurance company representatives concerning the facts and circumstances surrounding the "accidents" or "losses".

22. It was a further part of the scheme that the defendants attempted to and did persuade other individuals to make material misrepresentations of fact to insurance company representatives. This was done in an attempt to lend credence to the defendants' fraudulent insurance claims.

Appendix A

23. It was a further part of the scheme that the defendants forged and caused to be forged signatures, check endorsements and other writings to bolster fraudulent claims.

24. It was a further part of the scheme that the defendants threatened to sue and did, in fact, sue various parties when the defendants' fraudulent claims did not result in an early settlement.

25. It was a further part of the scheme that the defendants made material misrepresentations of fact and withheld material information in pretrial depositions and other court related documents.

26. It was a further part of the scheme that the defendants induced others to make material misrepresentations of fact and withhold material information in pretrial depositions and other court related documents.

27. It was further part of the scheme that the defendants committed perjury to advance their fraudulent insurance claims.

28. It was a further part of the scheme that the defendants attempted to persuade others to commit perjury in connection with the defendants' fraudulent claims. To achieve this end, the defendants offered to and did give money and other things of value to individuals to procure their perjured testimony.

29. It was a further part of the scheme that the defendants deceived, attempted to deceive, and coached others to deceive insurance companies, judges and juries.

30. It was a further part of the scheme that the defendants invested the proceeds of their fraudulent activities in luxury items

such as lavish houses, expensive cars and boats. The defendants, in turn, used these luxury items and promises of great financial reward as bait to recruit others into the fraudulent scheme.

31. It was a further part of the scheme that the defendants threatened to bring law suits against insurance companies, their employees and other individuals whenever those companies, employees or individuals questioned the legitimacy of the defendants' claims or representations or exchanged information about defendants' claims. The purpose of these threats was to discourage and prevent additional inquiries into the defendants' illegal activities.

32. It was a further part of the scheme that the defendants' attempted to and did harass and intimidate potential witnesses before the federal grand jury investigating the defendants' activities. This harassment and intimidation was carried out to prevent the grand jury from obtaining evidence which might prove harmful to the defendants and the continuation of their scheme.

33. On or about September 30, 1980, in the Eastern District of Pennsylvania, the defendants

JOSEPH HOUGHTON, a/k/a "Thomas Cassidy"
JOHN CASSIDY, a/k/a "John Gavin"
KATHLEEN CASSIDY, a/k/a "Kathleen Gavin"

for the purpose of executing the scheme and attempting to do so, knowingly and willfully caused to be delivered by the United States mail, according to the direction thereon, a check from J.C. Penney Life Insurance Company in the amount of $2,000.00 made payable to JOHN CASSIDY, 3352 Bryan Ct., Bensalem, PA 19020.

Appendix A

In violation of Title 18, United States Code, Sections 1341 and 2.

[Pages 10 through 55 of the Indictment, comprising Counts 2 through 45, have been omitted as they charge further specific mailings and related charges by incorporating these initial 9 pages of the indictment.]

APPENDIX B—ORDER DATED FEBRUARY 27, 1987, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DENYING PETITIONERS' MOTION TO DISMISS THE INDICTMENT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 85-349

UNITED STATES OF AMERICA

v.

JOSEPH HOUGHTON, et al

ORDER

This 27th day of February, 1986, upon consideration of various motions filed by the defendants in the above-captioned action, memoranda submitted and following oral argument on February 13, 1986 and February 27, 1986 for reasons stated following oral argument on each of these dates, but more particularly following oral argument on February 27, 1986, it is

A. ORDERED that the following Motions are DENIED:

1. by Nancy Cohan, John Cassidy and Kathleen Cassidy, and Joseph Houghton and Donna Houghton - to Dismiss;

* * *

By the Court:

s/ Alfred L. Luongo

APPENDIX C—JUDGMENT ORDER DATED AUGUST 10, 1987, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING JUDGMENT OF CONVICTION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1419/20

UNITED STATES OF AMERICA

v.

JOSEPH HOUGHTON, a/k/a "Thomas Cassidy"
DONNA HOUGHTON, a/k/a "Donna Livoy"

Joseph Houghton, Appellant in No. 86-1419
Donna Houghton, Appellant in No. 86-1420

(Criminal No. 85-00349-01/02 - E. D. of Pa.

District Judge: Hon. Alfred L. Luongo

Submitted Under Third Circuit Rule 12(6)
August 7, 1987

Before: SEITZ, MANSMANN and GREENBERG, *Circuit Judges.*

JUDGMENT ORDER

After consideration of the contentions raised by appellants, in the above captioned matters, to-wit, that (1) the trial court erred in denying dismissal of this mail fraud indictment due to

its insufficiency under federal constitutional and procedural law and, if dismissal is not the appellate remedy, a new trial should be granted where the trial court failed to use the "clearly charged" standard of *United States v. Miller,* 471 U.S. 130 (1985) in determining the scope of the scheme to defraud and nature of false representations charged by the grand jury in this indictment; (2) the government failed to prove the unitary scheme alleged in the bills of particulars; (3) a new trial should be granted because the trial court refused to give a *Kotteakos* charge on unitary scheme; (4) a judgment of acquittal or a new trial should be granted on specific counts of the indictment for the following reasons applicable to the particular counts:

(a) a judgment of acquittal should be granted to appellants on the "2/28/80" counts because the evidence was insufficient to prove "staging and fabrication" beyond a reasonable doubt;

(b) a new trial should be granted to appellant, Joseph Houghton, on the "Linda Livoy" accident counts because appellant's conviction may rest upon an "alternative theory of guilt" not charged by the grand jury;

(c) a new trial should be granted to appellant, Joseph Houghton on the counts applicable to the "Linda Livoy", "Jack Cassidy" and "Nancy Cohan" accidents because these co-appellants suffered substantial prejudice by joiner in this indictment and appellant, Joseph Houghton, was convicted on the theory that he aided and abetted the commission of their offenses;

(d) with respect to the counts of the indictment dealing with the "Albeser" accident, a new trial should be granted to appellants on the grounds that the (i) trial court erred in instructing the jury

that Consolidated Freightways was, as a matter of law, an insurance company, (ii) that conviction on these counts could have been based on one of the "alternative theories of guilt"; and (iii) that the trial court erred in excluding the Keeley testimony and after consideration of the relevant contentions adopted by the appellants from the briefs of the other co-appellants, reflected in the Judgment Orders in No. 86-1421, No. 86-1422, Nos. 86-1423/24 and No. 86-1611, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

s/ Seitz
Circuit Judge

ATTEST:

s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: Aug 10 1987

APPENDIX D—ORDER DATED SEPTEMBER 18, 1987, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1419
No. 86-1420

UNITED STATES OF AMERICA

v.

JOSEPH HOUGHTON, a/k/a "Thomas Cassidy"
DONNA HOUGHTON, a/k/a "Donna Livoy"

(Criminal Action No. 85-00349-01/02 - E.D. Of Pa.)

SUR PETITION FOR REHEARING

PRESENT: GIBBONS, *Circuit Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN and GREENBERG, *Circuit Judges*.

The petition for rehearing filed by appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix D

BY THE COURT:

s/ Seitz
Circuit Judge

Dated: Sep 18, 1987

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9-18-87
SALLY MRVOS
Clerk

APPENDIX E—ORDER DATED OCTOBER 26, 1987, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT STAYING MANDATE TO NOVEMBER 17, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-1419 & 84-1420

UNITED STATES OF AMERICA

vs.

JOSEPH HOUGHTON and DONNA HOUGHTON,

Appellants

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until November 17, 1987.

s/ Seitz
Circuit Judge

Dated: Oct. 26, 1987

RECEIVED AND FILED
10-26-87
SALLY MRVOS
Clerk